THE NECESSITY FOR AN INSTRUMENT TO BE "EXHIBITED" WHEN PAYMENT IS DEMANDED IN ORDER TO BIND THOSE SECONDARILY LIABLE.—In the Negotiable Instruments Law, which *in toto,* or by statutes very similar to it, has practically universal application in the United States, there appears a clause in regard to what is sufficient presentment and demand for payment to effect a dishonor and bind those secondarily liable, the indorsers. A typical example of such clause reads: "The instrument must be exhibited to the person from whom payment is demanded, and when it is paid, must be delivered up to the party paying it." [1] The purpose of this clause is to give the maker the opportunity of examining the instrument; first, that he may determine its genuineness or falsity; second, that he may immediately reclaim possession of it upon paying the amount; and third, that he may ascertain whether the holder has the right to receive the payment. Note that the statute uses the word "exhibited".

With such as a basis, is it possible that there are any circumstances under which the holder may make a due presentment and demand, and yet not exhibit the instrument or even have it with him? The negotiable instruments law of the law merchant was that this right of actual exhibition was for the benefit of the maker alone, and if he refused payment on some other ground, and did not demand the exhibition, he waived this right, and the instrument would be duly dishonored.[2] The doctrine of the law merchant has not been altered by this particular section of the Negotiable Instruments Law,[3] and, therefore, cases arising before and after its adoption may be considered together.

The right to demand an actual production of the instrument is for the personal benefit of the maker alone, for the purposes indicated above, and the maker can legally waive this right, which he does, when, not asking to see the note, he refuses payment on other grounds. The failure under these circumstances to produce the instrument in no wise affects the indorsers so long as the maker has been given an unequivocal opportunity to take the note up at the proper time.[4] With this right of waiver recognized, the law will not insist on the idle ceremony of producing the paper and flaunting it in the maker's face (satisfaction having been refused on other grounds) just to comply with the technical wording of a statute, when such is not its reasonable mean-

[1] Negotiable Instruments Law of New York, § 81 (Gen. Laws of N. Y., 1897, c. 612).

[2] King *v.* Crowell, 61 Me. 244, 14 Am. Rep. 560.

[3] Porter *v.* East Jordan Realty Co. (Mich.), 177 N. W. 987. 8 CORPUS JURIS 560, in referring to this clause of the Negotiable Instruments Law, says, "But this right to have the paper produced may be waived by failure to request its production, the same as under the law merchant."

[4] King *v.* Crowell, *supra;* Frendenberg *v.* Lucas (Col.), 175 Pac. 482; Porter *v.* Thom, 57 N. Y. Supp. 479; Waring *v.* Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890; Hodges *v.* Blaylock, 82 Ore. 179, 161 Pac. 396; 3 R. C. L. 1204.

ing. These are safeguards to the maker, and if he waives them, the law will not insist on useless acts. *Lex neminem cogit ad vana.*[5]

Carrying the case further, it is recognized that such a waiver may be perfectly legal although the holder does not even have the note with him, it being near by at his office. This is reasonable; for there is no difference in effect, when payment is refused because of lack of funds, whether the note is on the person of the one making the demand or at his office a few doors distant.[6] Observe that here the note is close by and can be quickly procured in case exhibition is demanded. The limit of the right of waiver seems to be at this point. If the note is in another town, then exhibition cannot so easily be made, if requested by the maker, especially if it is payable during certain hours at a bank, and the law very reasonably seems to consider a demand for payment by one necessarily without the note in his possession as insufficient to charge the indorsers.[7]

Modern inventions have had their effect on laws, and it would seem that the law of negotiable instruments, the child of business, should be eager to accept new methods convenient to its purposes. In *Gilpin* v. *Savage*,[8] the question of due presentment and demand arose when the holder made demand by telephone, and the maker, without asking for exhibition of the note, refused on other grounds. The message covered only the space of two miles, yet the court went on record as saying that such demand over the telephone would be insufficient. It appears that the same rule as to distance should be applied here as above, so long as there is certainty as to the identity of the parties speaking. Is it not very technical and outside the spirit of the law to declare the demand insufficient, if a party across the street makes his demand over the telephone, rather than by actually crossing the street? But such appears to be the law as laid down by the only case found on these facts. The proper rule, it would seem, would be to hold a demand by telephone sufficient where, if presentment of the instrument were requested, it could be exhibited in a short time.

The use of the mails in making a demand without presentment of the instrument has not been sanctioned.[9]

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[5] Union Bank of Louisiana *v.* Lea, 7 Rob. (La.) 76, 41 Am. Dec. 275; see Porter *v.* East Jordan Realty Co., *supra*, for elaborate references.

[6] Porter *v.* East Jordan Realty Co., *supra.*

[7] Freeman *v.* Boynton, 7 Mass. 483.

[8] 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A 861.

[9] Bayless *v.* Harris, 124 Mo. App. 234, 101 S. W. 617.